

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

JAMES M. JORDAN and NANCY L.  
JORDAN,

Plaintiffs,

v.

BANK OF AMERICA and RECONTRUST,  
Defendants.

Case No. 3:13-cv-00058-MMD-WGC

ORDER

(Defs.' Motion to Dismiss – dkt. no. 4)

**I. SUMMARY**

Before the Court is Defendants Bank of America, N.A. ("BANA") and ReconTrust Company, N.A.'s ("ReconTrust") Motion to Dismiss. (Dkt. no. 4.) For the reasons set forth below, the Motion is granted.

**II. BACKGROUND**

**A. Factual Background**

Plaintiffs James M. Jordan and Nancy L. Jordan purchased real property located at 3042 Mckall Circle, Elko, Nevada (the "Property") on or about July 8, 2008. (Dkt. no. 1-1 ¶ 2.) To finance the purchase of the Property, Plaintiffs obtained a loan from Countrywide in the amount of \$353,400.00, which was secured by a Deed of Trust. (*Id.*; dkt. no. 4-2.)<sup>1</sup> The Deed of Trust names Countrywide Bank, FSB as lender, Stewart Title

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<sup>1</sup>Defendants have requested that the Court take judicial notice of attached copies of relevant publicly recorded documents. The Court takes judicial notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (explaining the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 of Nevada Holding, Inc. as trustee, and Mortgage Electronic Registration Systems, Inc.  
2 ("MERS") as nominee and beneficiary. (Dkt. no. 4-2 at 1.)

3 On April 5, 2010, MERS assigned its beneficial interest in the Deed of Trust to  
4 BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP. (Dkt. no.  
5 4-3.) The same day, BAC Home Loans Servicing substituted ReconTrust as the trustee.  
6 (Dkt. no. 4-4.)

7 Plaintiffs defaulted on the loan secured by the Deed of Trust by failing to make the  
8 payment due on December 1, 2009. (Dkt. no. 4-5.) Plaintiffs claim that they purposely  
9 missed three mortgage payments in order to qualify for a loan modification, which they  
10 had not qualified for while current. (Dkt. no. 1-1 ¶¶ 13–17.) The terms of the loan require  
11 a payment of \$2,710.68 per month. (*Id.* ¶ 9.) They state that they were told by a Bank of  
12 America representative that the bank could not help Plaintiffs with a loan modification  
13 unless Plaintiffs missed three payments. (*Id.* ¶ 15.) Because Plaintiffs then missed  
14 payments, ReconTrust, as duly substituted trustee, executed and recorded a notice of  
15 default on April 5, 2010. (Dkt. no. 4-5.) The foreclosure sale was scheduled for October  
16 7, 2010. (Dkt no. 18 ¶ 29.)

17 Plaintiffs engaged in a negotiation with Bank of America to avoid foreclosure. On  
18 September 20, 2010, Plaintiffs were informed by a Bank of America employee that the  
19 foreclosure would not be stopped unless Plaintiffs provided the "full reinstatement  
20 amount." (Dkt. no. 18 ¶ 30.) On September 27, 2010, they spoke with a Bank of America  
21 foreclosure department representative, Ms. Whitaker, who informed Plaintiffs that they  
22 owed approximately \$32,000.<sup>2</sup> (*Id.* ¶ 36.) Plaintiffs claim they asked Ms. Whitaker if  
23 sending \$22,000 would stop the foreclosure and Ms. Whitaker responded that such a  
24 payment would be accepted as a "good faith offer" and would stop the auction." (Dkt no.  
25 1-1 ¶ 38.) Plaintiffs assert that Ms. Whitaker also stated that Plaintiffs should not worry

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27 <sup>2</sup>Plaintiffs simultaneously state that they missed three payments and that their  
28 reinstatement amount was \$32,000. The Court notes this unexplained discrepancy but  
accepts as true both statements for the purposes of a motion to dismiss.

1 about foreclosure and that she had “never seen a borrower send that much money and  
2 then be foreclosed on.”

3 However, Plaintiffs allege that on October 6, 2010, the day before the scheduled  
4 auction, Ms. Whitaker called Plaintiffs to inform them that their offer of \$22,000 was  
5 rejected and that they would need to pay an additional \$10,037 or the house would be  
6 foreclosed on. (*Id.* ¶ 44.) Plaintiffs wired the money and on October 7, 2010, ReconTrust  
7 canceled the foreclosure. (*Id.* ¶¶ 45, 55.)

8 ReconTrust rescinded the Notice of Default in October 2010, recorded on October  
9 14, 2010. (Dkt. no. 4-6.) The parties agree that the Property has not been foreclosed  
10 upon.

11 Throughout the Complaint Plaintiffs recount a long and frustrating series of  
12 communications with BANA in which representatives provided contradictory pieces of  
13 information about the status of Plaintiffs’ loan. They also state that BANA has failed to  
14 provide adequate documentation of Plaintiffs’ payment history.

### 15 **B. Procedural History**

16 Plaintiffs commenced an action in the Fourth Judicial District Court of the State of  
17 Nevada against BANA and ReconTrust and Defendants timely removed the action. (Dkt.  
18 no. 1.) Plaintiffs bring six causes of action: (1) breach of express contract; (2) breach of  
19 good faith and fair dealing; (3) tortious breach of good faith and fair dealing/bad faith;  
20 (4) misrepresentation; (5) negligent misrepresentation; (6) wrongful foreclosure/breach of  
21 Chapter 107. (Dkt. no. 1-1.) Defendants seek dismissal under Fed. R. Civ. P. 12(b)(6)  
22 for failure to state a claim.

### 23 **III. LEGAL STANDARD**

24 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which  
25 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide  
26 “a short and plain statement of the claim showing that the pleader is entitled to relief.”  
27 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While  
28 Rule 8 does not require detailed factual allegations, it demands more than “labels and

1 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v.*  
2 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).  
3 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550  
4 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient  
5 factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at  
6 678 (internal citation omitted).

7 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to  
8 apply when considering motions to dismiss. First, a district court must accept as true all  
9 well-pled factual allegations in the complaint; however, legal conclusions are not entitled  
10 to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of action,  
11 supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district  
12 court must consider whether the factual allegations in the complaint allege a plausible  
13 claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint  
14 alleges facts that allow a court to draw a reasonable inference that the defendant is  
15 liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the  
16 court to infer more than the mere possibility of misconduct, the complaint has “alleged –  
17 but not shown – that the pleader is entitled to relief.” *Id.* at 679 (internal quotation marks  
18 omitted). When the claims in a complaint have not crossed the line from conceivable to  
19 plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

20 A complaint must contain either direct or inferential allegations concerning “all the  
21 material elements necessary to sustain recovery under *some* viable legal theory.”  
22 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,  
23 1106 (7th Cir. 1989) (emphasis in original)).

#### 24 **IV. DISCUSSION**

##### 25 **A. Breach of Contract**

26 “A plaintiff in a breach of contract action must show (1) the existence of a valid  
27 contract, (2) a breach by the defendant, and (3) damage as a result of the breach.”  
28 *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1240 (D. Nev. 2008) (citations

1 and quotation marks omitted). A contract is a promise or a set of promises for the breach  
2 of which the law gives a remedy, or the performance of which the law in some way  
3 recognizes as a duty. Restatement (Second) of Contracts § 1 (1981). A contract must  
4 include the following elements: "intent, offer, acceptance, consideration, mutuality of  
5 agreement and obligation." *Matter of Estate of Kern*, 107 Nev. 988, 994 (Nev. 1991).

6 Plaintiffs allege in their Complaint that there was an "express contractual  
7 relationship" between the parties "not to foreclose on Plaintiff's home." (See dkt. 1-1  
8 ¶ 104.) They state that Defendants breached the contract by refusing to "fulfill its  
9 obligations, including but not limited to its failure and refusal to not foreclose on the  
10 subject property."<sup>3</sup> (Dkt. no. 1-1 ¶ 107.)

11 As an initial matter, Plaintiffs do not make clear which agreement they are alleging  
12 is a contract that Defendants breached. However, "[a] document filed *pro se* is to be  
13 liberally construed." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks  
14 and citation omitted). The Court will therefore consider two potential agreements implied  
15 from the pleading.

16 The only written agreement submitted to the Court is the Deed of Trust. Plaintiffs  
17 cannot succeed on their breach of contract claim if the contract at issue is the loan  
18 documents (i.e., Promissory Note and Deed of Trust). The Deed of Trust specifically  
19 provides for foreclosure in the event of default and the failure to cure. (Dkt. no. 4-2 at  
20 13.) Plaintiffs admit that they missed three mortgage payments (dkt. no. 1-1 ¶¶ 13–17)  
21 and Defendants have provided the Notice of Default recorded prior to the scheduled  
22 auction. Once Plaintiffs cured the default by paying the approximately \$32,000 owed, the  
23 house, by Plaintiffs own admission, was removed from auction.

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26 <sup>3</sup>In their Opposition brief, Plaintiffs claim that Defendants breached because they  
27 "did not remove plaintiffs' house from the auction on October 7, 2010, as promised."  
28 (Dkt. no. 12 at 17.) However, this is contrary to the allegations in their Complaint that  
Defendants cancelled the October 7 foreclosure sale after receiving additional payment.  
(Dkt. no. 1-1 ¶¶ 45, 55, 56).

1 In the alternative, Plaintiffs may be arguing that a contract was formed through  
2 Plaintiffs' conversation with Ms. Whitaker regarding the payment amount necessary to  
3 stop the foreclosure sale scheduled in October 2010, in which Plaintiffs were initially  
4 informed that \$22,000 was sufficient and then this amount was later increased to  
5 \$32,000. First, Plaintiffs have not pled the existence of such an oral contract with  
6 sufficient specificity. The Complaint simply states that there was an express contractual  
7 relationship "not to foreclose on Plaintiff's home." Moreover, Plaintiffs cannot establish  
8 that the agreement not to foreclose was supported by sufficient consideration. See  
9 *Nurczewska v. Fed. Home Loan Mortg. Corp.*, No. 12-55309, 2013 WL 2687379, at \*1  
10 (9th Cir. June 5, 2013). Plaintiffs already owed the amounts that they eventually paid to  
11 stop the foreclosure pursuant to the Promissory Note and Deed of Trust. They do not  
12 dispute that the amount they paid was the amount needed to cure the default pursuant  
13 to their contractual obligations under the Note and Deed of Trust. While the process was  
14 no doubt frustrating, by making the payment to stop the foreclosure, Plaintiffs were not  
15 undertaking any action that they were not otherwise required to perform and thus the  
16 payment is not consideration for a contract not to foreclose. See *Cnty. of Clark v.*  
17 *Bonanza No. 1*, 615 P.2d 939, 944 (Nev. 1980) ("Consideration is not adequate when it  
18 is a mere promise to perform that which the promisor is already bound to do."); see also  
19 *Ramanathan v. Saxon Mortg. Servs., Inc.*, No. 2:10-02061, 2011 WL 6751373, at \*3 (D.  
20 Nev. Dec. 21, 2011) ("It is axiomatic that giving a party something to which he has an  
21 indisputable right is not consideration.") (citing *U.S. ex rel Youngstown Welding & Eng'g*  
22 *Co. v. Travelers Indem. Co.*, 802 F.2d 1164, 1169 (9th Cir. 1986)).

23 Plaintiffs' allegations do not show that a contract was established to modify their  
24 payments to stop the October 2010 foreclosure. To the extent Plaintiffs rely on loan  
25 documents as the contract upon which they base their claim, Plaintiffs cannot  
26 demonstrate that this contract was breached.

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1           **B. Breach of Good Faith and Fair Dealing**

2           Nevada recognizes the existence of an implied covenant of good faith and fair  
3 dealing in every contract. *Pemberton v. Farmers Ins. Exchange*, 848 P.2d 380, 382  
4 (Nev. 1993). The law in Nevada is that “[e]very contract imposes upon each party a duty  
5 of good faith and fair dealing in its performance and its enforcement.” *A.C. Shaw Constr.,*  
6 *Inc. v. Washoe County*, 784 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of  
7 Contracts § 205). “When one party performs a contract in a manner that is unfaithful to  
8 the purpose of the contract and the justified expectations of the other party are thus  
9 denied, damages may be awarded against the party who does not act in good faith.”  
10 *Hilton Hotels v. Butch Lewis Prods., Inc.*, 808 P.2d 919, 923 (Nev. 1991). To succeed on  
11 a cause of action for breach of the covenant of good faith and fair dealing, a plaintiff  
12 must therefore show: (1) the plaintiff and defendant were parties to an agreement; (2)  
13 the defendant owed a duty of good faith to the plaintiff; (3) the defendant breached that  
14 duty by performing in a manner that was unfaithful to the purpose of the contract; and (4)  
15 the plaintiff's justified expectations were denied. *Id.*; see also *Perry v. Jordan*, 900 P.2d  
16 335, 338 (Nev. 1995).

17           Plaintiffs contend that the parties entered into “express and implied contractual  
18 relationships” and that Defendants violated the covenant of good faith and fair dealing on  
19 at least eight occasions. (Dkt. no. 1-1 ¶¶ 111-12.) These occasions are derived from  
20 events that Plaintiffs identify as steps towards wrongful foreclosure and refusal to  
21 provide loan modification. In their Opposition, Plaintiffs focus on their conversation with  
22 Ms. Whitaker about removing the house from auction and a potential loan modification.  
23 (Dkt. no. 12 at 19.)

24           Any alleged breaches of good faith and fair dealing as they relate to the Note and  
25 Deed of Trust must fail because, as discussed above, the steps Defendant took towards  
26 foreclosure were explicitly within the scope of the contract. Plaintiffs have admitted that  
27 they missed at least three payments and the Deed of Trust states that foreclosure  
28 proceedings may commence if Plaintiffs default. After Plaintiffs paid Defendants the



1 missing funds, the Property was removed from auction and the house was not  
2 foreclosed on.

3 Plaintiffs have failed to connect all other alleged breaches of good faith and fair  
4 dealing outlined in the Complaint to a viable contract. As explained above, Plaintiffs have  
5 not adequately pled that their conversation with Ms. Whitaker regarding the pending  
6 auction or loan modification was a binding contract and therefore they cannot succeed  
7 on this claim. See *Wensley v. First Nat. Bank of Nevada*, 874 F. Supp. 2d 957, 964 (D.  
8 Nev. 2012).

9 This claim is dismissed against all Defendants.

### 10 **C. Tortious Breach of Good Faith and Fair Dealing/Bad Faith**

11 In order to maintain a tort-based claim for breach of an implied covenant, there  
12 must be a special relationship between the tort-victim and the tortfeasor, especially  
13 where the “the party in the superior or entrusted position has engaged in grievous and  
14 perfidious misconduct.” *State, Univ. and Cmty. Coll. Sys. V. Sutton*, 103 P.3d 8, 19 (Nev.  
15 2004) (internal quotations and citations omitted); *A.C. Shaw Const., Inc.*, 784 P.2d at 10  
16 (special relationship required for tort-based claim but not for contract-based claim).

17 Plaintiffs have not demonstrated the existence of a special relationship. Generally,  
18 a lender, or an assignee of an original lender, does not owe a borrower a fiduciary duty.  
19 See *Yerington Ford, Inc. v. General Motors Acceptance Corp.*, 359 F. Supp. 2d 1075,  
20 1092 (D. Nev. 2004). Trustees likewise do not have a special relationship with borrowers  
21 and owe no duty beyond those imposed by the deed of trust and the Nevada foreclosure  
22 statutes. See *Rutherford v. Integrity 1st Fin. Grp.*, No. 3:12-cv-19, 2012 WL 3205851, at  
23 \*5 (D. Nev. Aug. 3, 2012). Plaintiffs have pled no special circumstances in this case in  
24 support of their claim that such a relationship existed. Absent a duty, there can be no  
25 breach. See *A.C. Shaw Const., Inc.*, 784 P.2d at 10.

### 26 **D. Misrepresentation**

27 A claim of fraud requires the plaintiff to establish each of the following elements:  
28 (1) a false representation; (2) knowledge or belief that the representation was false (or



1 knowledge that the defendant's basis for making the representation was insufficient);  
2 (3) intent to induce the plaintiff to consent to the contract's formation; (4) justifiable  
3 reliance upon the misrepresentation; and (5) damage resulting from such reliance. *J.A.*  
4 *Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1018 (Nev. 2004). Fed.  
5 R. Civ. P. 9(b) requires that a party alleging fraud "must state with particularity the  
6 circumstances constituting fraud or mistake." To satisfy this standard, a plaintiff must  
7 plead "an account of the 'time, place, and specific content of the false representations as  
8 well as the identities of the parties to the misrepresentations.'" *Swartz v. KPMG LLP*, 476  
9 F.3d 756, 764 (9th Cir. 2007) (*quoting Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066  
10 (9th Cir. 2004)).

11 Plaintiffs claim that "[i]n the Spring of 2009, through its lawful representatives in  
12 written communications and telephone, BOA represented to Plaintiff [that if Plaintiff]  
13 made one payment, it would be considered good faith, and that BOA would not go  
14 forward with the foreclosure and would permanently modify the terms and conditions of  
15 repayment thereafter." (Dkt. no. 1-1 ¶ 124.) Plaintiffs further allege that BANA required  
16 Plaintiffs to make another \$10,000 payment to stop the foreclosure. (*Id.* ¶ 125.)

17 Plaintiffs have not pled this claim with the particularity required for a  
18 misrepresentation claim. They have not stated which written and telephone  
19 conversations they believe constitute a misrepresentation, with which Bank of America  
20 representatives they conversed, and when these conversations occurred. Plaintiffs  
21 discuss a number of conversations throughout the Complaint but do not identify in claim  
22 four which of these they believe constitute misrepresentation. Additionally, of these  
23 numerous conversations, not one occurred in spring 2009.

24 Assuming that Plaintiffs intended to reference their phone conversation in fall  
25 2010 with Ms. Whitaker, they have failed to plead all of the necessary requirements of a  
26 misrepresentation claim. Plaintiffs allege that Ms. Whitaker stated that a payment of  
27 \$22,000 would stop the foreclosure but then subsequently stated that Bank of America  
28 required an additional \$10,037. Even if the Court were to find that this was a

1 misrepresentation that was fraudulently made, Plaintiffs have not adequately alleged the  
2 remaining elements of the claim. Plaintiffs do not allege that Defendants intended to  
3 induce Plaintiffs into the agreement to pay \$22,000, an offer Plaintiffs originally made.  
4 They also fail to allege reasonable reliance, a point which may otherwise be undermined  
5 by the fact that a different Bank of America representative had told Plaintiffs a week  
6 previously that they would need to pay the full reinstatement amount.

7       Regarding a loan modification, Plaintiffs cannot demonstrate misrepresentation  
8 because they have failed to adequately plead that Defendants promised to modify their  
9 loan. Plaintiffs state that Defendants told them in December 2009 that they did not  
10 qualify for a home loan modification and that they would only be able to help if Plaintiffs  
11 missed three mortgage payments. (Dkt. no. 1-1 ¶¶ 13–16.) Plaintiffs contend that as a  
12 result of this conversation, they purposely missed three mortgage payments. (*Id.* ¶ 17.)  
13 Defendants' statement, taken as true for the purpose of the complaint, cannot be  
14 construed as a representation that they would "permanently modify the terms and  
15 conditions of repayment."

16       Finally, even if Defendants' statement is construed as a promise to modify the  
17 loan, such a statement cannot be construed as a misrepresentation as Plaintiffs admit  
18 that they were offered a loan modification. (*Id.* ¶ 20.) The fact that Plaintiffs were  
19 disappointed by the modification does not demonstrate that Defendants made a false  
20 representation as they do not allege in the Complaint that Defendants made a  
21 representation about what the modification would entail.

22       These claims are therefore dismissed against all Defendants.

### 23       **E.     Negligent Misrepresentation**

24       The Nevada Supreme Court has adopted the following definition of negligent  
25 misrepresentation from the Restatement (Second) of Torts § 552:

26               One who, in the course of his business, profession or  
27               employment, or in any other action in which he has a  
28               pecuniary interest, supplies false information for the guidance  
                 of others in their business transactions, is subject to liability  
                 for pecuniary loss caused to them by their justifiable reliance

1 upon the information, if he fails to exercise reasonable care  
2 or competence in obtaining or communicating the  
information.

3 *Barnettler v. Reno Air, Inc.*, 956 P.2d 1382, 1387 (Nev. 1998). Reliance is required to  
4 prevail on a claim for negligent misrepresentation. *Bill Stremmel Mtrs. v. First Nat'l Bank*,  
5 575 P.2d 938, 940 (Nev. 1978).

6 Plaintiffs' negligent misrepresentation claim is vulnerable to the same problems  
7 with particularity described in the Court's analysis of the misrepresentation claim. See  
8 *supra* Part IV.D. Additionally, Plaintiffs have not pled the existence of a duty of care and,  
9 as described above, lenders and trustees do not typically have a fiduciary duty to a  
10 borrower. See *supra* Part IV.C.

11 **F. Wrongful Foreclosure/Breach of Chapter 107**


12 Under Nevada law, to succeed on a claim of wrongful foreclosure a plaintiff must  
13 show that a lender wrongfully exercised the power of sale and foreclosed upon his or her  
14 property when the homeowner was not in default on the mortgage loan. See *Collins v.*  
15 *Union Federal Sav. & Loan Ass'n*, 662 P.2d 610, 623 (Nev.1983). The parties agree that  
16 the house was not foreclosed upon. Accordingly, this claim is dismissed against all  
17 Defendants.

18 **V. CONCLUSION**

19 The Court notes that the parties made several arguments and cited to several  
20 cases not discussed above. The Court has reviewed these arguments and cases and  
21 determines that they do not warrant discussion as they do not affect the outcome of the  
22 Motion.

23 It is therefore ordered that Defendants' Motion to Dismiss (dkt. no. 4) is granted.  
24 Dismissal of Plaintiffs' claims is without prejudice.

25 DATED THIS 19<sup>th</sup> day of September 2013.

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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE